IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 462

FRANK C. GIERENS AND NIKOLAS J. FERENCAK,
Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

EVERETT JENNINGS,
Counsel for Petitioners.

WILLIAM L. CARLIN,
LOUIS A. ROSENTHAL,
Of Counsel.

THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

The petitioners, Frank C. Gierens and Nikolas J. Ferencak, respectfully petition this court to issue its Writ of Certiorari to review the judgment of the Supreme Court of the State of Illinois entered on the 20th day of May, 1948, affirming the sentence theretofore entered (Tr. p. 47) by the Circuit Court of Carroll County, Illinois, upon a charge of larceny.

The sentence of the Trial Court is set out in the Record (Tr. 14). The opinion of the Supreme Court of Illinois affirming the judgment of the trial court is set out in the

Record (Tr. p. 41) and is reported officially in 400 Ill. 347 (Adv. Shts. Sept. 15, 1948).

The trial court rushed the defendants (Petitioners here) into trial and provided them with a special jury, without discharging the regular jury. The order for the special jury was entered outside the presence of the defendants.

The verdict of the jury was insufficient; it did not find the defendants guilty of any crime. There was no judgment entered in the case, only a sentence by the court, which was fatally defective because it mentioned no crime.

On an all-important question of law—whether there could be ownership proven as to money in an illegal gaming machine, the subject matter of the charge of larceny, the court ruled erroneously that there could be.

The trial from beginning to end was travesty of the recognized rules of due process of law.

The Supreme Court of Illinois, deploring the arbitrary switch of jury panels said that in the absence of showing of prejudice, it would not interfere. The highest court of Illinois moreover, had a "last clear chance" to straighten out this case on a major question of law and didn't. A petition and motion to vacate and reconsider the decision of the lower court was filed and cases in point adduced showing the lower court had aggregiously erred in the major point of the case, namely, that the money in the gambling machine couldn't be introduced in evidence because the gambling machine as well as the money in it was contraband. The Supreme Court of Illinois merely said "motion denied".

Before this court is a solid question of due process of law and an utterly erroneous decision of the case as a matter of law.

Jurisdiction:

Jurisdiction is invoked to review the judgment of the Supreme Court of Illinois under the new Judicial Code, 28 U. S. Code., Chap. 81, Sec. 1257 (3). The contention of petitioners is that they have been denied due process of law as guaranteed by the fifth amendment to the constitution of the United States and the fourteenth amendment thereof relating to the states. Jurisdiction of this court is also invoked to reverse a void judgment.

Questions Presented:

1. Was there a denial of due process of law to the petitioners by:

(a) Compelling them to take a jury from a special panel, where the regular panel was available, not discharged or exhausted.

(b) Entering order for special panel outside the presence of the defendants.

(c) A verdict which does not find the defendants guilty of any crime to base a judgment on. No judgment at all, and a sentence which does not refer to any crime.

2. Was the decision in the case erroneous as a matter of law.

STATEMENT.

Petitioners, defendants below, were indicted on July 14, 1948, in Carroll County, Illinois, upon a charge of larceny of two gambling machines and money contained therein.

A motion to quash the counts relating to larceny of the machines proper was sustained (Tr. p. 3) but overruled as to larceny counts relating to the money contained in the machines.

On September 22, 1947 outside the presence of the defendants, the trial court entered an order for a special panel of fifty jurors because, as the court stated, it was convinced from the circumstances of case (what circumstances, the court did not state) that a jury could not be obtained from the regular panel (Tr. p. 3-4).

Thereupon on October 10, 1947 the court furnished to the defendants a list of the original panel of jurors then and there present for jury service, and also a list of fifty names of jurors summoned as a special panel, and set the case for trial on October 13th (Tr. p. 4).

On October 13th, before the commencement of the trial, the defendants filed a motion to challenge the array of jurors, charging that the regular panel of 24, the statutory number, was not available in open court for the purpose of being examined for service, though they had never been discharged by order of court; that they constituted a valid and existing panel subject to call for service as jurors; that the defendants were entitled to choose a jury from the regular and not from the special panel; that the special panel could not lawfully serve until the regular panel had been examined and exhausted; that the proceedings were improper because the court had not called the regular panel for service in the trial; and that the

order of September 22nd for the special panel was illegal because it was entered outside the presence of the defendants. The court overruled this motion (Tr. p. 8).

The evidence of the state was to the effect that the defendants took two gambling devices alleged to contain in the aggregate $29.45, allegedly the property of the complaining witnesses. A motion for directed verdict by defense was denied (Tr. p. 14).

The verdict of the jury found the defendants guilty and fixed the value of the money at $29.45, but did not find them guilty of the crime charged in the indictment. The court sentenced defendants to the (Tr. p. 14) penitentiary for a period of not less than two years nor more than 4 years, but the judge neither entered judgment on the verdict nor found the defendants guilty of any crime. A motion in arrest of judgment was made and overruled (Tr. p. 14).

A motion for a new trial was made and overruled (Tr. p. 14).

REASONS FOR ALLOWANCE OF THE WRIT.

1. The defendants in the trial of the case were denied due process of law because:

(a) The trial court foisted on the defendants a special jury while there remained undischarged and unexhausted a regular panel from which to draw a jury.

(b) The order for a special panel jury was made outside the presence of the defendants.

(c) The verdict in the case did not say for what crime they found the defendants guilty; and in effect there was no judgment by the court on the verdict; there was only a sentence. This leaves the case with merely an insuffi-

cient verdict and no judgment at all, and a sentence which is fatally defective.

2. The crime charged was larceny of money in certain gaming machines. Since the law as established by several state supreme court decisions and even by decision of the Appellate Court of Illinois itself, is that there can be no property in the money in gaming machines, the crime of larceny was a legal impossibility in this case, because the essential element of the charge of larceny requires proof of taking of property belonging to someone.

Wherefore, the petitioners herein respectfully pray that a Writ of Certiorari issue out of and under the seal of this Court, directed to the Supreme Court of Illinois, commanding that court to certify and send to this court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record of all the proceedings herein, to the end that the judgment of the Supreme Court of Illinois may be reviewed and reversed by this Court.

Respectfully submitted,

NIKOLAS J. FERENCAK,
FRANK C. GIERENS,
By: EVERETT JENNINGS,
Counsel for Petitioners.

Of Counsel:
WILLIAM L. CARLIN,
LOUIS A. ROSENTHAL.

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BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

A. The Defendants Were Denied Due Process of Law In the Trial of the Case.

This case is a judicial mess; everything is wrong with it from beginning to end. Every fundamental right ordinarily accorded a defendant has been trampled upon or swept aside. Instead of getting due process of law, the defendants here were just, so to speak, processed.

1. Compelling Defendants to Select a Jury From a Special Panel, Where the Regular Panel Was Available, Undischarged, and Not Exhausted, Was a Denial of Due Process.

July 14, 1947, an indictment was returned against the defendants (Tr. p. 1). The following September 22nd, the court (outside the presence of the defendants) entered an

order for a special panel of jurors (Tr. pp. 7-8). On October 10th, the court furnished the defendants with two lists: one list comprising 24 names of the regular existing panel of jurors and another list of fifty, a special panel (Tr. p. 5).

Ordinarily in a criminal case, and as a matter of due process, a list of talesmen is furnished the defense a reasonable time before the trial, usually about two weeks in advance, for the purpose of allowing the defense to make an investigation of the prospective jurymen to determine what prejudice against the defendants might exist in their minds. In this case there were two lists furnished, one of the regular panel of 24 and the other the special panel of 50, making a total of 74, and the court allowed only three days time for investigation. It obviously was impossible to do that in a rural sparsely settled area.

The State, as indicated, had a regular panel of 24 talesmen available who had not by any order of court been discharged as jurors. Notwithstanding that fact, the court ordered a special venire of 50 to be called for service in the case. The court in its order for the special venire of September 22nd declared that it was convinced that a jury could not be obtained out of the regular panel, but gave no reason why it was so convinced; it stated no reason why a special panel was necessary. Moreover, the state, instead of serving the talesmen with summons in the regular way as provided by statute, disregarded the statute and summoned the special 50 veniremen by mail (Tr. p. 11).

All these irregularities is evidence of a studied effort on the part of the state not only a rush the defense into trial, but to deny them a regular and fair trial.

When the case came on for trial on October 13, 1947, the defendants filed a motion to challenge the array for the reasons: that the regular panel, though never dis-

charged, was not made available to the defendants; that the defendants were entitled to choose a jury from the regular and not from the special panel; that the special panel could not lawfully serve until a regular panel had been discharged; and for the further reason that the order of September 22, providing for the special panel was illegal because it had been entered outside the presence of the defendants (Tr. p. 6). The court overruled this motion and ordered the case to go to trial (Tr. p. 8).

Black in his Handbook of American Constitutional Law (4th Edition) page 626 says: "As to the method of trial, due process of law requires that the accused should be tried according to the law and evidence in the case and that he should be given an opportunity to defend himself according to the established constitutional rules of procedure."

In *Frank* v. *State*, 142 Ga. 741, the court declared that the 14th amendment of the Federal Constitution gave the United States a right to supervise the performance of the duty of a State not to deny due process of law to its citizens. It gave to the U. S. (p. 748) the right to supervise the performance of the duty, and transferred from the State to the Federal Supreme Court the ultimate decision on the question of due process in all proceedings affecting life, liberty and property.

In the case of *State of Missouri* v. *Holme*, 54 Mo. 153, the Supreme Court of Missouri held that it was reversible error for the lower court to have allowed, over objection, a jury to be selected from a list of which two of the persons who were among the first twelve on the list were omitted and thereby excluded from the jury. The defense in the case as in the case at bar was that no injury to the defendant was shown.

The Texas Court of Appeals in *Hall* v. *State*, 12 S. W. 739, held it was a reversible error, in a case similar to

ours, for the court to require the defendants to select a jury from the second venire where the original panel remained undischarged and not exhausted. In the cases of *Sharpe* v. *State,* 17 Texas App. 486, and *Funk* v. *State* (1919), 84 Texas App. 402 at 406, the same court laid down the principle that the defendant had a right to select a jury from the original venire; that the original venire must be exhausted before another is summoned or used; that the court is not authorized to bring in a new venire when the old one is not exhausted.

The Supreme Court of the United States in *Claussen* v. *U. S.,* 114 U. S. 477 at 488 decided inferentially that where the original panel of jurors was not exhausted the court had no right to resort to a special panel. It is true that by statute in Illinois (Ill. Rev. Statutes, Chap. 78, Section 8, Par. 8) the court is authorized to call a special panel, but the clear intent of that statute is that the special panel may be used only to supplement the original panel after the original panel is discharged or exhausted by challenges.

The Supreme Court of Illinois in the case at bar in its opinion (Tr. p. 41) recognized that the rights of the defendants were invaded by the use of a special jury and registered its disapproval of the method pursued by the State, but said that in the absence of special showing of prejudice it would not interfere. The State's brief cited several Illinois decisions that irregularities in impaneling a jury is not reversible error unless the defendant can show prejudice. But in none of the cases cited was the original panel proffered to the defendants and then denied them for use at the trial, as in our case. The defendants in the case at bar had a right to expect the original panel of 24 jurors to be available to them because on October 10th a list of those 24 was furnished to them as well as a list of the 50 of the special venire.

Was there prejudice? There are indications that there was. The defendants were seeking an early trial and the State delayed giving them an early trial (Tr. p. 4). Suddenly on the 10th of October, the court gave the defendants two lists of jurors, the regular as well as the special, and set the trial for the 13th of October. Three days time to investigate the prejudice of 74 talesmen was unreasonable. The purpose of tendering the lists of talesmen was obviously for the ostensible purpose of giving the defendants an opportunity to make an investigation of the prospective jurymen. The trial court's action prevented the defendants in the first instance from discovering prejudice. By its attitude the court made apparent its own prejudice, and thereby estopped itself and the prosecution from requiring the defendants to do what it itself prevented. The burden in such a case should be shifted to the state to show there was no prejudice to the defendants by the irregular procedure.

There is grave suspicion of prejudice as to jury selection from the denial of due process time and again by the court in the conduct of the trial. It may be fairly asked why did the court submit a list of the regular panel and then prevent the defense from choosing from among them? There was prejudice indicated or a fair opportunity for the defendants to discover prejudice prevented. In either case due process of law was denied them.

2. The Defendants Were Denied Due Process of Law When the Order for a Special Jury Was Entered Without Their Presence in Court.

The order for the special venire was entered outside the presence of the defendants. This is borne out by the affidavits of the defendants (Tr. p. 7-8), and also by a strange order of the trial court, which (Tr. p. 3) indicates that some order or orders had been entered outside the presence of the defendants, and attempts to correct the irregu-

larity by means of a re-order. The affidavit of the defendants states that the order that was entered outside their presence was the order for a special venire; the order of the court which attempted to correct previous orders entered outside the presence of the defendants speaks of an order with respect to the motion to quash the indictment. But whatever order was entered outside the presence of the defendants it never, according to the record, was vacated.

In the case of *People* v. *McGrane*, 336 Ill. 404 at 408, the court declared that it is a fundamental constitutional right of a defendant in a criminal case to be present in open court at every stage of the proceedings; and held that it was reversible error for the court to give the jury an instruction outside of his presence, even though his attorney was present in court at the time. Whether the order was for a special venire or with respect to the motion to quash the indictment, the defendants had a right to be present when the order of court was entered; and the court could not correct its order made outside their presence without first vacating that order.

Here again is shown how the case of these defendants was tried in a haphazard, careless manner and in contravention of the constitutional guaranty of due process of law.

3. The Verdict of the Jury Is Insufficient to Support a Judgment, for It Does Not Find the Defendants Guilty of Any Crime; a Judgment of the Court Is Non-Existent. The Sentence of the Court Without Due Process of Law Is Void.

The verdict in this case is verbatim as follows:

> "We, the Jury find the Defendants, Nikolas J. Ferencak and Frank C. Gierens, guilty. We fix the value of money stolen at $29.45. We find the age of the defendant, Frank C. Gierens, to be 60 years, and we find the age of Nikolas J. Ferencak to be 33 years." (Tr. p. 14.)

The verdict is defective because it does not find the defendant guilty of any particular crime, nor does it refer to any crime charged in the indictment.

The most recent expression of the Supreme Court of Illinois on the question of sufficiency of verdicts in criminal cases was in the case of *State of Illinois* v. *Krazik*, 73 N. E. 2nd. 297 at 300. The court laid down the rule that a verdict is fatally defective if it either does not contain all the substantive elements of the crime or refer to the indictment charging the crime.

In the instant case there was neither a reference to the indictment in the verdict nor did it contain the substantive elements of the crime. It follows from the rule laid down in the *Krazik* case that the verdict is fatally defective.

There was no judgment in this case. The sentence was:

> "Defendants, Frank C. Gierens and Nikolas J. Ferencak, each sentenced to confinement in Illinois State Penitentiary for a period of not less than two years nor more than four years:" (Tr. p. 14.)

The sentence wholly failed to mention any crime. Depending as it does on a defective verdict, it certainly cannot support the verdict, leastwise cure it. A search of the cases reveals no case where as in our case, the verdict as well as the sentence fails to mention any crime.

In this case, then, there is no legal verdict, there is no judgment and there is no legal sentence. The best that can be said about the sentence is that it is, in effect, a mittimus upon which the defendants are to be taken to prison without due process of law.

B. The Decision in the Case Is Wrong as a Matter of Law.

The gist of the charge in this case was the taking of two gaming machines by the defendants from certain persons who claimed ownership of them.

There were five counts to the indictment. Two counts, involving the taking of slot machines were stricken on motion to quash. The remaining counts, 1-3 inclusive, charged the taking by the defendants of money in the value of $29.45 from the complaining witnesses, money which was in the slot machines (Tr. p. 1). The upshot of the charge against the defendants was that they stole slot machines of the complaining witnesses, which contained $29.45.

The trial court overruled a motion of the defendants to exclude certain evidence pertaining to money contained in the slot machines, for the reason that the money as well as the slot machines were illegal, contraband and not properly the subject matter of property (Tr. p. 2). This we believe was distinct error committed by the trial court. In the case of *Ge..nania Club* v. *City of Chicago, et al.*, 332 Ill. App. (1947) 112, it was held that money found in a slot machine formed an integral part of the illegal gambling device, was contraband and never became property of the possessor of the slot machine. Had the evidence in our cause been excluded as to the $29.45 in coins found in the slot machines in question, there would have been no case made out against the defendants.

In *Weis* v. *Allman*, 325 Ill. App. 554 at 565 the Court declared that gambling devices are not subject matter of property and could not be recovered by replevin action. Other cases in this state have upheld this proposition of law, among them, the case of the *State of Illinois* v. *Sayer*, 330 Ill. App. 181 at 186. The Supreme Court of Illinois

in the case of *Frost* v. *People*, 193 Ill. 635, at the bottom of page 640 said:

> "The legislature has determined that gambling implements and apparatus are pernicious and dangerous to the public welfare, and the keeping of them is an offense prohibited by law. They are, therefore, not lawful subjects of property which the law protects, but have ceased to be regarded or treated as property. * * *"

The Supreme Courts of several other jurisdictions, as well as the Appellate Court of Illinois in the *Germania Club* case above cited, have held that money found in slot machines are an integral and component part of the slot machines and are not subject matter of property. In *Dorrell* v. *Clark*, 4-P 2nd 712 (Montana Supreme Court—1931), a case involving the seizure of money found in slot machines, the Court said that the money had been placed in the machines by parties unknown on the chance that the mechanism might discharge a greater amount from the stored up capital of the machine; that all the money in the machines belonged to those who had put it into the machine and not the custodian of the machine; that the money, as well as the machine, was contraband. To the same effect was the holding in *State* v. *McNichols*, 117 P. 2nd (Idaho Supreme Court) 468.

In our case, the money, subject matter of the charge of larceny, was not taken out of the machines by the defendants (Tr. pp. 30-31), nor was the $29.45, which the defendants were charged taking ever appropriated by the complaining witnesses (Tr. pp. 15-16). The Supreme Court of Ohio in *The State* v. *Klozar*, 46 N. E. 2nd. 474 has held that the claimants of the slot machines were not entitled to the return of the money in the slot machines because the money was an integral part of the machines and not appropriated by the purported owners thereof.

Evidence was allowed to go in at the trial of the case as to the money in the machines being the property of the complaining witnesses. In view of the law above cited it is apparent that the lower court committed reversible error in overruling defendants' motion to exclude such evidence (Tr. p. 5), for the money was an integral part of the slot machines which were contraband and not subject matter of property of the complaining witnesses. Larceny in this case was a legal impossibility.

Relying on the case of *Harder* v. *Matthews*, 309 Ill. 548 at 565, the petitioners here presented a motion to the Supreme Court of Illinois to vacate its order denying the petition for re-hearing, in which motion it was brought to the attention of the Supreme Court of Illinois that the Appellate Court of Illinois and the Supreme Courts of several other states had established the law that there could be no property in money in a gaming machine, and that therefore, there could be no larceny of money in gaming machines for the simple reason that to prove larceny there must necessarily be proof of ownership of the property alleged to be taken (Tr. p. 55). This gave the Supreme Court of Illinois a last clear chance to reconsider the case and enter a correct decision in the case, but the Supreme Court of Illinois refused to entertain this motion to reconsider the case.

This court has jurisdiction by virtue of the case of *Patterson* v. *Alabama* (1939), 294 U. S. 600 at 607 to remand the case to the Illinois Supreme Court for reconsideration and proper decision. In the *Patterson* case the United States Supreme Court, even though the matter before it was a non-federal question, remanded the case to the Supreme Court of Alabama, which had previously refused to consider the facts of the case on the grounds that the Bill of Exceptions was filed too late, the remanding court finding that the bill of exceptions was filed in

due time. On the basis of the authority of the *Patterson* case, the United States Supreme Court has precedent for remanding the case at bar to the Supreme Court of Illinois for reconsideration so that a correct decision of the case may be had.

For the reasons urged the petitioners pray that the writ of certiorari be granted.

Respectfully submitted,

EVERETT JENNINGS,
Attorney for Petitioners.

Of Counsel:
WILLIAM L. CARLIN,
LOUIS A. ROSENTHAL.

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MOTION OF PETITIONERS FOR LEAVE TO FILE INSTANTER THEIR PETITION FOR REHEARING SUPPORTED BY AFFIDAVITS OF THEIR COUNSEL.

EVERETT JENNINGS,
Counsel for Petitioners.

WILLIAM L. CARLIN,
LOUIS A. ROSENTHAL,
WM. SCOTT STEWART,
Of Counsel.

Donnelley & Sons, 350 S. Market St., Chicago 6. FEderal 1-0262

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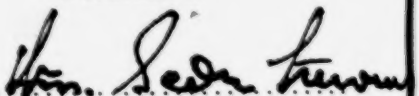
MOTION.

STATE OF ILLINOIS } SS
COUNTY OF COOK }

Now come petitioners, Frank C. Gierens and Nicholas J. Ferencak, by Wm. Scott Stewart, one of their counsel, and moves this Honorable Court to allow petitioners herein to

file instanter the petition for rehearing, and in support of this, petitioners hereto attach and tender with this motion the affidavits of their counsel.

FRANK C. GIERENS,
NICHOLAS J. FERENCAK,
Petitioners.

By 

WM. SCOTT STEWART,
Counsel.

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AFFIDAVIT.

STATE OF ILLINOIS }
COUNTY OF COOK } ss

Wm. Scott Stewart, being first duly sworn, on oath deposes and states that he is duly licensed to practice law in the State of Illinois and the Supreme Court of the State of Illinois, and that he has been duly admitted to the Supreme Court of the United States to practice before this Honorable body.

Affiant further states that he was engaged by the petitioners above named to prepare and file a petition for rehearing on their behalf. That said petition for rehearing

is practically complete for forwarding and filing in this Honorable Court.

Your affiant further states that it had been his understanding of the rules of this Honorable Court relating to petition for rehearing, that petitioners had twenty-five (25) days to file petition for rehearing within twenty-five (25) days after judgment or decision. That on wit the 19th day of February, 1949, affiant was advised by the Clerk of this Honorable Court that the rule governing the filing of petitions for rehearing were amended to the extent that the time for the filing of stated petitions for rehearing was reduced to fifteen (15) days. This affiant states that he was unfamiliar with the revised rule.

Wherefore, affiant most respectfully prays that an order may be entered herein allowing petitioners to file instanter petition for rehearing in this cause.

Hin. Seern Tuns

Subscribed and sworn to before me this 25th day of February, 1949.

William H. Cook

Notary Public.

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AFFIDAVIT.

STATE OF ILLINOIS }
COUNTY OF COOK } ss

William L. Carlin, being first duly sworn, on oath deposes and states that he is duly licensed to practice law in the State of Illinois and the Supreme Court of the State of Illinois. Affiant further states that he is one of original counsel for the petitioners herein, together with Louis A. Rosenthal and Everett Jennings.

Affiant further states that the said petitioners engaged Wm. Scott Stewart as additional counsel for the petitioners

herein to prepare and file a petition for rehearing on their behalf.

Affiant further states that he, together with his co-counsel, Louis A. Rosenthal and the said Everett Jennings, were not familiar with the amended rule of this Honorable Court changing the time of the filing of petition for rehearing in this Honorable Court and were of the belief that the petitioners had twenty-five (25) days from the judgment or decision of the said Justices of the Supreme Court of the United States in which to file a petition for rehearing on behalf of the petitioners herein, and it was not until the 19th day of February, 1949, when the Clerk of the United States Supreme Court advised the said Wm. Scott Stewart that the time in which the petition for rehearing may be filed was reduced to fifteen (15) day by virtue of said amended rule governing the filing of petitions for rehearing.

Wherefore, this affiant most respectfully prays that the motion of the petitioners herein to file for petition for rehearing be granted.

William S. Co.....

Subscribed and sworn to before me this 25th day of February, 1949.

Louis A. Rosenthal.....

Notary Public.